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IN THE

Supreme Court of the United States

October Term, 1967

NO. 877

ANDREW NICHOLSON

v.

C. D. CALBECK, DEPUTY COMMISSIONER, ET AL

PETITION FOR WRIT OF CERTIORARI

MANDELL & WRIGHT
Attorneys for Petitioner
707 South Coast Building
Houston, Texas 77002
228-1521

Of Counsel
HERMAN WRIGHT

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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NO._____

ANDREW NICHOLSON

v.

C. D. CALBECK, DEPUTY COMMISSIONER, ET AL

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Andrew Nicholson, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in this case.

Opinions Below

The opinion of the United States District Court for the Southern District of Texas, Houston Division, was rendered on October 31, 1966, and is reported in 266 F. Supp. 103.

The opinion of the Court of Appeals for the Fifth Circuit was rendered on October 31, 1967, and is as yet unpublished. A copy of that opinion is appended as "Appendix A."

Jurisdiction

The opinion of the Court of Appeals for the Fifth Circuit was rendered on October 31, 1967.

The jurisdiction of this Court to review the judgment complained of by writ of certiorari is conferred by 28 U.S.C.A. 1254(1) and 2101(c).

Constitutional Provision and Statutes Involved

Article 1, Section 8: "The Congress shall have Power * * * to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof."

Article 3, Section 2: "The judicial Power shall extend * * * to all cases of admiralty and maritime jurisdiction."

The Longshoremen's and Harbor Workers' Compensation Act as amended, 33 USCA 901, et seq, provides in its pertinent parts as follows:

"Section 902. DEFINTIONS.

When used in this chapter—

(2) The term 'injury' means accidental injury or death arising out of and in the course of employment, * * *

(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part upon the navigable waters of the United States (including any drydock).

"Section 903. COVERAGE.

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but

only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

"Section 904. LIABILITY FOR COMPENSATION.

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under Sections 907-909 of this title.

"Section 920. PRESUMPTION.

In any proceedings for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter."

QUESTION PRESENTED

Whether a longshoreman, injured while temporarily on the pier, is entitled to federal compensation, where the pier, as found by the Deputy Commissioner, was "upon, over or above navigable waters of the United States," and where the injury was caused by the hatch beams of the vessel during the loading of the vessel.

STATEMENT OF POSITION

Petitioner, the injured employee, contends that the Deputy Commissioner, the District Court and Court of Appeals erred in holding that his injury did not come within the provisions of the Longshoremen's and Harbor Workers' Compensation Act in view of the following findings of fact by the Deputy Commissioner:

FINDINGS OF FACT

"1. On May 26, 1960, the employee above named was in the employ of the employer above named, whose address was 324 Shell Building, Houston, Texas, in the Eighth Compensation District. The employer was subject to the provisions of the Longshoremen's and Harbor Workers' Compensation Act. The liability of the employer for compensation under the said Act was insured by the Texas Employers' Insurance Association.

2. On the said day the employee herein sustained injury resulting in disability, while performing service as a longshoreman for the employer upon a dock, wharf, or pier and hereafter referred to as 'dock.' On said day said stevedoring work on the S/S 'MARY SOPHIA' was being performed by the Crown Stevedoring Company. The said dock was upon, over or above navigable waters of the United States. Said dock was erected on pilings and concrete blocks which rested in the bed of navigable waters of the United States. The inshore edge of the dock is attached to the outboard edge of the employer's warehouse, a portion of which likewise is upon, over or above navigable waters of the United States so that the inshore edge of the dock is not attached to or supported by land. In preparing the vessel to load some cargo, some 'tween deck beams were placed out on the dock because there was no place on the vessel to stow the beams, as the hatch cover was removed. A pallet was placed on the dock and the first beam placed on its side on the pallet.

3. Later in the day, it became necessary to shift the vessel. Rather than place the beams back on the vessel to be shifted with the vessel itself, forklifts were used to pick up the beams and thus carry them down the dock to the new position of the vessel. The employee proceeded on down the dock to where the vessel was shifted. As he reached a point

about midway of the two ends of the beams, one of the fingerlifts hit a railroad track on the dock which caused the loads to bounce. The said beams were part of the ship's gear used to cover up the hatch openings.

4. The employee sustained his injury while assisting in moving portions of the vessel (its hatch beams) to a new loading location for the vessel alongside the said dock. As two of the employee's fellow gang-members were moving the beams along the dock by means of forklifts, the beams slid from their resting place on the forklifts, striking employee on the back of his legs.

5. The employee sustained an above-the-knee amputation of the right leg. The left lower leg, below the knee, the skin over the middle half of the leg was very thin. There were several small areas where the skin had been broken and adhered. The skin adhered or stuck to the tibia or leg bone. There was a well-healed, curved surgical incision on the middle third at the front of the leg. There was marked tenderness immediately below this. There was a slight swelling of the left foot in the metatarsophalangeal joint, where the little toe joins the foot, which was dislocated. The range of motion of the ankle was limited to ten degrees. There were healed fractures of the first, second, and fourth metatarsals with mal or angular union and dislocation of the little toe on the metatarsal.

6. The employee cannot stand properly on the left foot without crutch or cane. He cannot do any significant amount of manual labor. The employee is 63 years of age. His work experience is limited to manual labor and his education extends only to the third grade. Following the injury the employee was incapable of performing his pre-injury work and therefore he had suffered an impairment of his wage-earning capacity, i.e.: permanent total disability.

7. It is common practice in the Port of Houston for some longshoremen to work on the dock and later on the vessel or first on the vessel and later on the dock. There is an interchange of such work. The employees report to the Union Hall for hiring. Any time a gang is called to work general cargo, some members of the gang may work on the vessel and some on the dock, but the employees of the gang do not know at the Union Hall whether the work assignment is to be on the dock or on the vessel. After the gang reaches the vessel, they learn what work is to be done, and the work assignment is then given. There is no difference in the rate of pay of the gang except for the foreman, whether they are working on the vessel or on the dock, but there might be a pay differential depending on the type of cargo handled.

8. At the time of the employee's injury the employer had other employees who were engaged in maritime employment upon the navigable waters of the United States.

9. Longshore work includes the loading or unloading of cargoes or moving or handling the same on any dock, platform or place or in any warehouse or other place of storage. This is a dockside accident that arose out of and in the course of the employee's employment. At the time of the employee's injury, he was engaged in service connected with the loading of a vessel. Taken as a whole, the accident occurred on the dock which was a means, or connecting link, in furnishing ingress to and egress from the said vessel.

10. Written notice of injury was not given to the employer within thirty days, but the employer had knowledge of the injury and has not been prejudiced by the lack of such written notice. The employer furnished the employee with medical treatment, etc., in acordance with the provisions of Sec-

tion 7(a) of the said Act. The average weekly wage of the employee at the time of injury was $94.46. He was not paid full wages for day of injury.

11. As a result of the injury, the employee became wholly disabled on May 26, 1960, and such disability is continuing and is permanent.

12. The employer and the insurance carrier have paid $6,160.00 as disability benefits under the Texas Workmen's Compensation Act, for which they are entitled to take credit.

Upon the foregoing findings of fact, it is ORDERED by the Deputy Commissioner that the claim for compensation be and it is hereby REJECTED for the following reason:

There is no authoritative determination that a dockside accident comes within the provisions of the Longshoremen's and Harbor Workers' Compensation Act."

REASONS RELIED UPON FOR GRANTING THE WRIT

1. The decisions below are contrary to the opinion of this Court in *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 82 S.Ct. 1196.

2. If this Honorable Court did not rule on this question of Congressional intent in the *Calbeck* case, then the question here presented is one on which the Court has not yet written but should do so since it is a question of great importance to a large segment of the waterfront work-force of this country. The effect of the decisions below is to attribute to Congress an intention to exclude from coverage the 25% of all injuries to longshore employees sustained on navigable waters which happen to occur on wharves or piers as the longshoremen work back

and forth between the wharf and the ship loading and unloading cargo.[1] The insurance industry itself has permitted no such distinction in that it requires the payment of the very same premium for *all members* of the longshore gang assigned to the vessel whether working on the vessel or on the dock.

3. In so far as the Circuit Court relied upon its decision in *Travelers Insurance Company v. Shea and McCollough,* decided August 9, 1967, (copy of opinion attached as "Appendix B") and presently pending on an application for writ of certiorari before this Court, the decision is contrary to the following opinions of this Court; *U. S. v. Appalachian Power Co.,* 311 U.S. 377, 61 S.Ct. 291; *Economy Light Co. v. U. S.,* 256 U.S. 113, 41 S.Ct. 409.

ARGUMENT

A. Legislative History

In response to *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 37 S.Ct. 524 (1917), which decided that a state workmen's compensation statute could not be applied to a maritime injury where there was no "local" concern because of the threat to "uniformity"; *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149, 40 S.Ct. 438 (1920), which struck down the initial legislative effort (Act of October 6, 1917, 40 Stat. 395) to permit maritime workers a recovery under a workmen's compensation statute because matters involving maritime contracts of employment were not of local concern, and the State could not be allowed by Congress to "declare the rights and liabilities incident to maritime employment" (id at 166);

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1. 42 New York Univ. L.J. 331, 344 footnote 114 (see also footnote 67 at p. 337).

Washington v. Dawson, 264 U.S. 219, 44 S.Ct. 302 (1924), which struck down Congress' second effort to have state compensation statutes apply to shore-based maritime employments because the statute was just another effort to permit states to declare liabilities "incident to maritime employment." Id at 226; the Federal Congress enacted the Longshoremen's and Harbor Workers' Act, 33 U.S.C.A., Sec. 901, et seq, hereinafter referred to as the Act.

As originally drafted, this Act was limited in application to injuries occurring within the traditional maritime tort jurisdiction and did not include those broader matters of maritime contract jurisdiction. This draft was not designed to cover all injuries in maritime employment on navigable waters.

Original identical bills, S. 3170 and H.R. 9498, introduced in February 1926, provided federal coverage only for those maritime-employment injuries "on a place within the admiralty jurisdiction of the United States, except employment of local concern and no direct relation to navigation or commerce." An attorney for the unions, testifying in support of the original bill, explained that the sole test of maritime tort jurisdiction was the place of the injury and thus longshoremen injured on wharves or docks in the course of marine employment could resort to state compensation and did not require federal protection. See Hearings on S. 3170, Senate Judiciary Committee, 69th Cong., 1st Sess., March 16, and April 2, 1926, pp. 29-31.

However, this limited original concept of federal compensation was shown to be unworkable because longshoremen and repairmen did work back and forth between

the wharf and the ship during the course of their maritime employment. The maritime employee, therefore, would be constantly passing back and forth between federal and state compensation with each being exclusive of the other.

Mr. L. B. Clark, testifying for the Labor Department, pointed out that longshoremen and repair people in the course of their maritime employment on navigable waters constantly worked back and forth between the ship and the dock. He further pointed out that Congress had the power to regulate maritime employment contracts and that a law could be drafted to provide federal compensation for all injuries to maritime employees for injuries "on the dock, on the bridge and in the ship." Senate Hearings, p. 40, 1926 A.M.C. 1488, 1505-1506.

Employer representatives appear to have objected to the original exclusory language on the ground that it was a potential source of litigation as to which compensation law would apply. Senate Hearings, pp. 57, 91, 95. A statement submitted by Henry Hunter, representing the Council of American Shipbuilders and the New York and New Jersey Drydock Association, urged that any bill enacted "should include all maritime employment under the admiralty jurisdiction." Senate Hearings, p. 95.

The Senate Hearings were concluded on April 2, 1926, and the House commenced its consideration of the bill. Most witnesses were, of course, the same. Mr. Hunter was somewhat more definite in his statement before the House in that he stated that *the bill enacted should include all injuries in maritime employment.* See Hearing on H.R. 9498, House Judiciary Committee, 69th Cong., 1st Sess., April 22, 1926, p. 65.

The necessity of expanding the original jurisdictional concept which limited application of the bill to injuries occurring within the admiralty tort jurisdiction was further emphasized by Cletus Keating speaking for the American Steamship Owners Association. He stated that the bill's reference to injuries "on a place within the admiralty jurisdiction" was not adequate to accomplish the intended task. He found it difficult to conjure a formula covering all injuries to men in maritime employment working back and forth between the ship and the wharf. However, he did add: "I think that coverage ought to be very carefully considered from the standpoint of jurisdiction. *We want to be sure that everybody gets in under those words.* And I am not sure that they do." House Hearing, p. 101.

One conclusion can reasonably be reached from the testimony at the Hearings: Both employer and employee representatives pressed Congress to broaden not narrow the scope of federal compensation. The testimony thus made it plain that there was a difficult problem in drafting language to cover all injuries to employees in maritime employment on navigable waters. Obviously, Congress had to abandon maritime tort jurisdiction as its jurisdictional guideline. A ready substitute was admiralty contract jurisdiction, but drawn to exclude employment of a maritime character but obviously of completely "local concern," such as office employees, freight handlers, etc., without using the phrase "local concern."

The redrafted bill was reported from committee on June 2, 1926. S. Rep. No. 973, 69th Cong., 1st Sess., p. 2. The committee obviously had sought to broaden coverage. The original bill's definition of an employer liable for federal compensation was "a person engaged in any employment covered by this Act." The amended version substituted "an employer any of whose employees are employed in

whole or in part upon the navigable waters of the United States (including any dry dock)." The expansion of the jurisdictional concept is here most dramatically demonstrated. Section 3 of the original bill had founded jurisdiction upon maritime tort jurisdiction in that the injury was required to have occurred "on a place within the admiralty jurisdiction of the United States, except employment of local concern * * *." The amended version substituted "upon the navigable waters of the United States (including any dry dock)." Notable aslo is the fact that the tort concept of "fault" was specifically eliminated in Section 904(b). Original Section 5 made the federal act exclusive of state laws. The amendments eliminated that provision and made the compensation remedy exclusive only of suits for damages.

Considering the impact of these amendments, it seems clear that the Committee had indeed responded to the urgings of union and employer groups. The jurisdictional or regulatory base of the Act was changed from maritime torts to maritime contracts. However, because the committee reports did not contain any explanation, one can only speculate as to the real intent. Nevertheless, a literal reading of the amended language leads inexorably to the conclusion that all maritime-employment injuries are covered regardless of whether the particular injury occurred aboard ship or on a wharf over, above and upon navigable waters or a graving dock on dry land.

The final explanation of the bill by Congressman LaGuardia absolutely confirms this broad intent of Congress:

> "Mr. Speaker, it is quite possible to explain the purpose and necessity of this bill in two minutes. * * * Owing to our dual form of government we find that longshoremen are employed by companies or individuals engaged in foreign or interstate com-

> merce, and therefore there is some question whether or not state law could be made applicable to them. In order to meet this situation, it is necessary to pass a federal law. This is what they are doing now. This law simply gives the longshoremen the benefit of up-to-date legislation to cover injuries sustained in the course of their employment. That is all there is to it." (68th Cong. Rec. 5414).

This final statement of intent surely overrides a one-sentence inconsistency appearing nine months earlier at page 16 of Senate Report No. 973. Moreover, it would be incongruous to attribute to Congress an intent to deal with only 75% of the problem (75% of the injuries occur on the ship and 25% on the dock). Indeed the insurance industry has extracted the same premium from the employer whether the member of the gang works on the ship or the dock.

B. JUDICIAL INTERPRETATION

The legislative history of the Act was reviewed by this Court in *Calbeck v. Travelers*, supra, where the Court found a congressional intention *"to exercise to the fullest extent all the power and jurisdiction it had over the subject matter"*[2] (emphasis supplied) so as "to provide compensation for all injuries sustained by employees on navigable waters, whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law."[3]

The Court, quoting with approval from *DeBardelben Coal Corp. v. Henderson* (5th Cir.), 142 F.2d 481, 483-484, added:

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2. 370 U.S. at p. 130, 82 S.Ct. at p. 1205.

3. 370 U.S. at p. 117, 82 S.Ct. at p. 1198.

"* * * the federal compensation laws should be liberally construed to cover *every case where the injury occurred on navigable waters and where within the rule of (Jensen)* * * * the action would have been in admiralty* * * *.

"* * * The elaborate provisions of the Act, viewed in the light of prior Congressional legislation as interpreted by the Supreme Court, *leaves no room for doubt, as it appears to us, that Congress intended to exercise to the fullest extent all the power and jurisdiction it had over the subject matter.*

"* * * It is sufficient to say that Congress *intended* the compensation act *to have a coverage co-extensive with the limits of its authority and that the provision 'if recovery * * * may not validly be provided by State law' was placed in the act not as a relinquishment of any part of the field which Congress could validly occupy, but only to save the act from judicial condemnation, by making it clear that it did not intend to legislate beyond its constitutional powers* * * *. IN THE APPLICATION OF THE ACT, THEREFORE, THE BROADEST GROUND IT PERMITS OF SHOULD BE TAKEN. NO GROUND SHOULD BE YIELDED TO STATE JURISDICTION IN CASES FALLING WITHIN THE PRINCIPLE OF THE JENSEN CASE MERELY BECAUSE THE SUPREME COURT, BEFORE THE FEDERAL COMPENSATON LAW WENT INTO EFFECT DID HERE A LITTLE, THERE A LITTLE, CHIP AND WHITTLE JENSEN DOWN IN THE MASS OF CONFLICTING AND CONTRADICTORY DECISIONS IN WHICH IT ADVANCED AND APPLIED THE 'LOCAL CONCERN' DOCTRINE TO SAVE THE EMPLOYEES INJURED ON NAVIGABLE WATERS, AND OTHERWISE REMEDILESS, THE REMEDIES STATE COMPENSATION LAWS AFFORDED THEM* * * *."[4] (All emphasis ours)

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4. 370 U.S. at p. 130, 82 S.Ct. at p. 1205.

C. EXTENT OF CONGRESSIONAL AUTHORITY

In light of this authoritative holding that Congress exercised its fullest authority in delineating coverage under the Act, it is sufficient here to determine whether Congressional authority extends to injuries occurring on the wharf.

In order to resolve this question, it must be determined whether the judicial authority of the United States courts extends to injuries on the wharf. For as explained by Judge Brown in The City of Norwalk:

> "Aside from the grant of power to regulate foreign and interstate commerce, the Constitution, it must be remembered, contains no direct grant to Congress of legislative power over the maritime law. Its authority upon that subject, over and above the power derived from the commercial clause, though no doubt now firmly established, (Butler v. Steamship Co., 130 U.S. 527; In re: Garnett, 141 U.S. 1, 14) rests upon implication only.
>
> "The grounds of this implication, briefly stated, are that the Constitution [illegible] extending the judicial power to all cases of [illegible]ume jurisdiction, presupposes a certain bo[illegible] maritime law as its necessary attendant; that [illegible] law is not only a matter of interstate and inter[illegible]national concern, but requires, also, harmony and consistency in its administration, and hence cannot be subject to defeat or impairment of liability to the diverse legislation of numerous states; and that Congress must, therefore, be the only body competent to make any needed changes in the general rules of the maritime law." 55 Fed. 98, 105-106 (S.D.N.Y. 1893).

Thus, if an admiralty court has jurisdiction over a wharf-injury, Congress likewise would have jurisdiction

and authority to enact appropriate legislation. Several courts have expressed this obvious conclusion. E.g., *De-Bardeleben Coal Corp. v. Henderson,* 142 F.2d 481, 483 (5th Cir. 1944); *Caldaro v. Baltimore & Ohio R.R.,* 166 F. Supp. 833, 836 (E.D.N.Y., 1956). And it does not appear open to question that a court in admiralty has jurisdiction over an injury to a longshoreman on the wharf. A case in point is *Spann v. Lauritzen,* 344 F.2d 204 (3rd Cir. 1965). There a longshoreman was injured by the operation of shore-based cargo hopper. As stated by the Court:

> "The equipment was not on the vessel and neither was the longshoreman at the time of his injury. But he was engaged in the actual work of unloading the cargo from the vessel and he was using equipment which was essential for this purpose."

In this factual circumstance, the court concluded that the injury was within the "maritime jurisdiction" of the United States courts. (Of course, we are not here concerned with other matters stated in the opinion attaching the warranty of seaworthiness to shore-based equipment). Accord: *Thompson v. Calmar S.S. Corp.,* 331 F.2d 657, 659 (3rd Cir. 1964), where the court stated: "If the longshoreman is actually engaged in the service of the ship, it is immaterial whether the accident caused by the vessel's unseaworthiness occurs away from the ship on the pier."

The Second Circuit has likewise taken the position that an injury on the wharf is within the "maritime jurisdiction" of a United States court, although it held that the warranty of seaworthiness attached only if the "shore-based equipment" had become attached in some way to the vessel. Thus the court stated in *Forkin v. Furness Withy & Co.,* 323 F.2d 638, 640, 641 (2nd Cir. 1963):

> "Defendant properly concedes that liability to the plaintiff for unseaworthiness is not ruled out because the accident did not happen aboard ship * * * [And] it may well be that once the conveyor was affixed to the ship, a seaman, or a stevedore engaged in loading or unloading would have been entitled to recover on the ground of unseaworthiness."

Also, the Ninth Circuit has stated by way of dictum that the maritime jurisdiction extends to dockside accidents. *Huff v. Matson Navigation Co.*, 338 F.2d 205, 210 (9th Cir. 1964). Recently, the Fifth Circuit has followed this lead, *Deffes v. Federal Barge Lines, Inc.*, 361 F.2d 422 (1966), and indeed it is probably significant to note that Nicholson's third-party case was litigated on the Admiralty Side (in District Court). *Nicholson v. SS MARY SOPHIA*, A.D. No. 63-H-83, S.D. Texas (1966).

A slight variation of this theme is that longshoremen actually working on land adjacent to a dry dock or marine railway have been held covered by the Longshore Act. *Holland v. Harrison Bros. Dry Dock and Repair Yard, Inc.*, 306 F.2d 369 (5th Cir. 1962), involved an injury to an employee working on the ground beneath a marine railway. The Fifth Circuit concluded that the injury came within the twilight zone. But relevant here is the statement of the court in Footnote 4, 306 F.2d at 373:

> "The literal language of the Longshoremen's Act seems to concern only the locality of the accident, but the history of the Act indicates that its underlying purpose was to embrace the admiralty jurisdiction whatever that might be."

It is obvious therefore that the court concluded that dry land adjacent to a marine railway was within the mari-

time jurisdiction. *A fortiori* an injury on a wharf, itself on navigable waters and adjacent to a vessel afloat in navigable waters, would fall within the maritime jurisdiction.

Maryland Casualty Co. v. Lawson, 101 F.2d 732 (5th Cir. 1939), involved an injury to a dry dock employee. In the course of its opinion, the court stated:

> "Appellants challenge this finding and allege the evidence shows the assault occurred on land adjacent to the marine railway. We consider that immaterial as the land was a part of the yard necessary to the operation of the marine railway." 101 F.2d at 733.

Travelers Ins. Co. v. McManigal, 139 F.2d 949 (4th Cir., 1944) was a case involving injury to a dry dock worker while working on the dry dock but while the dry dock was located on dry land. In upholding a federal compensation award, the court listed as the touchstone of recovery:

> "That the deceased employee was engaged in a maritime employment at a place within the admiralty jurisdiction of the federal courts." 139 F.2d at 952.

In some of the recent cases involving fact situations not dissimilar to those here, the lower courts have apparently ignored this Court's suggestion of caution in *Calbeck,* supra, "that the decisions between 1917 and 1926 produce no reliable determinant of valid state law coverage."[5] See *Houser v. O'Leary,* 253 F. Supp. 417; ____F.2d____; *O'Keefe v. Atlantic Stevedoring Co.,* 354 F.2d 48; *American Export Lines v. Revel,* 266 F.2d 82; *Johnston v. Marshall,* 128 F.2d 13, cert. den., 317 U.S. 629, 63 S.Ct.

5. 370 U.S. at p. 118, 82 S.Ct. at p. 1199.

44; *McGrath v. Hughes,* 264 F.2d 314. These courts have relied on three cases decided by this Court, two of which involve injuries predating enactment of the Act and one of which is not in point. All three, however, do involve injuries on a pier or wharf.

In *State Industrial Commission of New York v. Nordenholt,* 259 U.S. 263, 42 S.Ct. 473 (1922), the longshoreman was injured May 15, 1918, before the Act was passed by Congress. He was injured when "he slipped and fell on the dock." The court distinguished contract and tort admiralty jurisdiction saying:

> "The general doctrine that in contract matters jurisdiction depends upon the nature of the transaction and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled."[6]

Because "the stevedore's contract of employment did not contemplate any dominant federal rule concerning the master's liability for personal injuries received on land"[7] and the state statute did not "come into conflict with any superior maritime law,"[8] the Court allowed recovery under the state compensation act. The Court added:

> "Here no such antagonism exists. *There is no pertinent federal statute;* and application of the local law will not work material prejudice to any characteristic feature of the general maritime law."[9]

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6. 259 U.S. at p. 273, 42 S.Ct. 474.
7. Id at p. 276; Id at p. 475.
8. Id at p. 276; Id at p. 475.
9. Id at p. 276; Id at p. 475.

The second case involving an injury which preceded enactment of the Act is *T. Smith & Son, Inc. v. Taylor,* 276 U.S. 179, 48 S.Ct. 228. Although this case was decided in 1928, the injury involved occurred on March 25, 1925, hence a construction of the coverage of the federal act was not raised or discussed. To sustain the application of the state act, the Court relied on the tort admiralty doctrine that a wharf or pier is "an extension of the land."

The third case on which reliance is placed in these cases which deny coverage on the basis of the tort admiralty jurisdictional concept that a wharf or pier is an "extension of the land" is *Swanson v. Murra Bros.,* 328 U.S. 1, 66 S.Ct. 869. In this case, the longshoreman was injured on a pier as a result of being "struck by a life raft which fell from the vessel." He sought and was paid compensation under the state compensation act. The case arose when, relying on *International Stevedoring Co. v. Haverty,* 272 U.S. 50, 47 S.Ct. 19 and *O'Donnell v. Great Lakes Dredge & Dock Co.,* 318 U.S. 38, 63 S.Ct. 489, he thereafter sought to recover further from his employer under the Jones Act, 46 U.S.C.A. 688.

In denying recovery, the Court among other things, said:

> "But since this Act (Longshoremen's & Harbor Workers' Compensation) is restricted to compensation for injuries occurring on navigable waters, it excludes from its own terms and from the Jones Act any remedies against the employer for injuries inflicted on shore."[10]

10. 344 F.2d at p. 644.

One cannot quarrel with this statement. The statement has been seized upon, however, because the Court cites *Nordenholt,* supra, and *Smith & Son v. Taylor,* supra, as authority even though both involved injuries on wharves rather than injuries which in fact occurred on shore. But since a construction of the full sweep of the Act was not at issue in the case, there was not the urgency for the Court to be as precise as there would be in a case where such a construction was involved as in *Calbeck,* supra.

The fact is, as before stated, that this Honorable Court, unless it did so in *Calbeck,* supra, has not heretofore decided the precise question here involved.

In other recent cases involving fact situations similar to those here, the lower courts, in denying coverage, have adopted a reasoning which tears at the very vitals of the accepted notions of "navigable waters of the United States." See *Michigan Mutual Liability Company v. Arrien,* 344 F.2d 640, cert. den., 382 U.S. 835; and *Travelers Insurance Company v. Shea and McCollough* (Appendix B).

In *Arrien,* the Court, in supporting coverage under the Act, sought to distinguish an extension to a wharf, called a "temporary skid," from a wharf in the following language:

> "We are persuaded that the temporary skid was not part of and should not be analogized to, the wharf. A wharf or pier is usually built on pilings over what was navigable water. When the structure is completed, the water over which it is built is permanently removed from navigation, as if the structure had been in the first instance built on land."[11]

11. 344 F.2d at p. 644.

The Court of Appeals for the Fifth Circuit in the *McCollough* case and in this case adopted the "temporary" and "permanent removal from navigation" theory to deny coverage.

In this case, the owner of the wharf, Manchester Terminal & Compress Company, had applied to the U. S. Corps of Engineers pursuant to 33 USCA 403 for a permit to erect this wharf on the navigable waters of the Houston Ship Channel. The wharf had then been built pursuant to the permit issued by the Corps.

Not surprising is the fact that neither of the Courts (Second or Fifth Circuits) cited any authority for this broad and dangerous doctrine that federal jurisdiction over concededly navigable waters of the United States can somehow be ousted, "permanently" or otherwise, by federal permission to some private person or corporation to erect an approved pier or wharf in or on those concededly navigable waters. Indeed such a notion is contrary to expressions of this Court in *U. S. v. Appalachian Power Co.*, 311 U.S. 377, 61 S.Ct. 291; and *Economy Light Co. v. U. S.*, 356 U.S. 113, 41 S.Ct. 409.

In the *Appalachian Power* case, we find these statements:

> "When once found to be navigable, a waterway remains so."[12]
>
> "Nor is it necessary for navigability that the use should be continuous."[13]

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12. 311 U.S. at p. 408; 61 S.Ct. at p. 299.

13. Id at p. 409; Id at p. 300.

In *Economy Light & Power* are these observations:

> "The fact, however, that artificial obstructions exist capable of being abated, by due exercise of the public authority, does not prevent the stream from being regarded as navigable in law, if, supposing them to be abated, it be navigable in fact in its natural state."[14]
>
> "If they (navigable waters) are to be abandoned, it is for Congress, not the court, so to declare."[15]

D. THE TYPE OF VESSEL, "CANOE" OR OTHERWISE, IS NOT DETERMINATIVE OF NAVIGABILITY.

In this case, where the evidence showed that the water under the wharf, being part of the waters of the Houston Ship Channel, was deeper than the height of a man and remained freely navigable by small vessels, the Court of Appeals suggests that such is so only for vessels no "larger than a canoe." It then erroneously added that "The limited navigability of the waters under the pier is characteristic of piers generally and *as a matter of law is* not navigability within the meaning of the term 'navigable waters' ". (Appendix A; emphasis ours)

It is respectfully suggested that this Court long ago indicated that the type of size of vessels traversing the waterway was of no importance in determining the navigability of the waters.

In *U. S. v. The Monticello* (1874), 20 Wall 430, 87 U.S. 391, the Court said:

> "* * * the true test of the navigability of a stream does not depend on the mode by which commerce

14. 356 U.S. at p. 118; 41 S.Ct. at p. 411.

15. 356 U.S. at p. 124; 41 S.Ct. at p. 413.

is, or may be conducted, nor the difficulties attending navigation * * *.

It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion * * * rather than the extent and manner of that use."[16]

Again in *U.S. v. Holt State Bank*, 270 U.S. 49, 46 S.Ct. 197, the court pointed out that:

"* * * navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor in an absence of occasional difficulties in navigation but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce."

"* * * Early visitors and settlers in that vicinity used the river and lake as a route of travel *employing the small boats of the period* for the purpose."[17]

Robinson on Admiralty (1939 Ed.) discusses this subject and suggests that waters are navigable if they will float a vessel, and that a "canoe" has been held to be sufficient. (pp. 34-40)

E. In, On, Over and Upon As Distinguishing Factors.

In *McCollough* (Appendix B), the court below took occasion to make a distinction between "over" and "upon"

16. 20 Wall at p. 441, 87 U.S. at p. 394.

17. 270 U.S. at pp. 56 and 57, 46 S.Ct. at p. 199.

navigable waters, indicating that if Congress had intended to include "over" as well as "upon" it would have said so, and did not.

First of all, by the same token, one could argue that if Congress had intended to include dry land around "any drydock" it would have said so. See *Continental Casualty v. Lawson,* 64 F.2d 802; *Avondale Marine Ways v. Henderson,* 201 F.2d 437, 346 U.S. 366, 74 S.Ct. 100; *Holland v. Harrison Bros.,* 306 F.2d 369; *Maryland Casualty v. Lawson,* 101 F.2d 732.

It is unthinkable that an Act, which must be "liberally" construed in conformity with its purpose and in a way which avoids harsh and incongruous results,"[18] should be construed so hypertechnically. See *D'Aleman v. Pan American World Airways,* 259 F.2d 493; *Notarian v. Trans World Airlines,* 244 F. Supp. 874; *Dixon v. Oosting,* 258 F. Supp. 25; *U. S. v. Yee Nee How,* 105 F. Supp. 517.

F. ADMIRALTY EXTENSION ACT.

What has been said above does not depend upon the Admiralty Extension Act, 46 U.S.C.A., Sec. 740 (1948), which provides:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable waters, notwithstanding that such damage or injury be done or consummated on land."

At the outset, it must be decided whether the Extension Act has impact on the Longshore Act. The Sixth Circuit

18. Reed v. Yaka, 373 U.S. 410, 415, 83 S.Ct. 1349, 1353.

in *Interlake S.S. Co. v. Nielsen*, 338 F.2d 879, 882 (6th Cir. 1965) stated:

> "While the Admiralty Extension Act of 1948 obviously was not designed directly to affect the Longshoremen's and Harbor Workers' Compensation Act, it did serve to make clear that admiralty jurisdiction could extend to damage caused on land by marine events, although early case law held to the contrary."

And the court concluded:

> "It seems obvious to us that the trend of case law, the impact of the Admiralty Extension Act, and the effect of *Calbeck* have all pointed in the direction of expanding the boundaries of admiralty jurisdiction toward land. It does not require any great clairvoyant to hold that at present admiralty jurisdiction clearly encompasses the navigable waters immediately adjacent to a dock.
>
> "If *Calbeck* holds (and we think it does) 'that Congress intended the compensation act to have a coverage co-extensive with the limits of its authority' then there can be no doubt about the outcome of this appeal." 338 F.2d at 882-883.

In Footnote 4, the court recited:

> "In this regard, we have considered and rejected language relied upon by appellee from Atlantic Stevedoring Co. v. O'Keeffe, 220 F. Supp. 881 (S.D. Ga. 1963), finding this District Court opinion neither binding nor persuasive."

The matter was stated more emphatically by Judge Winter in *Boston Metal Co. v. O'Hearne*, U.S.D.C., District of Maryland, Admiralty No. 4412, June 21, 1963 (oral opinion), affirmed 329 F.2d 504 (4th Cir. 1964):

> "I take some comfort also in the Admiralty Extension Act, Mr. Whiteford, because, true, the Admiralty Extension Act was not passed until after the Longshoremen's and Harbor Workers' Compensation Act was passed, but I think that the *Calbeck* case makes perfectly plain that the application of the Longshoremen's and Harbor Workers' Act was not to be frozen to the Admiralty Jurisdiction of the United States as it existed in 1927 or as it was considered then to exist, but that rather there may be read into the Longshoremen's and Harbor Workers' Act a more flexible concept that under subsequent legislation or as a result of subsequent court decisions, the admiralty jurisdiction of the United States is being expanded and the application of the Longshoremen's and Harbor Workers' Act expands along with it."

Moreover, there is a host of cases holding injuries on a wharf to be within the maritime jurisdiction where either an appurtenance of a vessel or its gear or its cargo was a causative factor. The leading case is *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963). There a longshoreman was injured on the wharf when he slipped on beans that had spilled out of bags unloaded from the vessel, and the court had no difficulty in finding the incident within the maritime jurisdiction. Mr. Justice White for the court observed:

> "Respondent contends that it is not liable at least in admiralty, because the impact of its alleged lack of care or unseaworthiness was felt on the pier rather than aboard ship. Whatever validity this proposition may have had until 1948, the passage of the Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U.S.C., Sec. 740, swept it away. * * *"

E.G., *Hagan v. Ellerman & Bucknall S.S. Co.*, 318 F.2d 563 (3rd Cir. 1963) (injury 100' from the vessel); *Thompson v. Calmar S.S. Corp.*, 216 F. Supp. 234 (E.D. Pa. 1963) (injury on wharf); *Fitzmaurice v. Calmar S.S. Corp.*, 198 F. Supp. 304 (E.D. Pa. 1961) (injury on wharf).

In the instant case, it is undisputed that the claimant was injured by an appurtenance of the vessel (its hatch beams) while the vessel was being moved along the wharf to a new position. Therefore, he was in fact injured by a piece of ship's gear, making the Admiralty Extension Act directly applicable. Thus, the injury was within the maritime jurisdiction and the perview of the Longshore Act.

CONCLUSION

For all the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

MANDELL & WRIGHT

By _____
Attorneys for Petitioner
707 South Coast Building
Houston, Texas 77002
228-1521

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing petition were mailed to Mr. Ed Bluestein, Jr., Fulbright, Crooker, Freeman, Bates & Jaworski, Bank of the Southwest Building, Houston, Texas 77002, Attorneys for Crown Stevedoring Company and Texas Employers' Insurance Association; to Mr. John C. Eldridge and Mr. Leavenworth Colby, Department of Justice, Washington, D.C., and Mr. Jack Shepherd, Assistant United States Attorney, Federal Office Building, Houston, Texas 77002, Attorneys for C. D. Calbeck, on the 27 day of November, 1967, by depositing same in the United States mails, properly stamped and addressed.

Herman Wright

Herman Wright